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# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 436

MARIO MORANO, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 122-130) are not officially reported. The opinion of the Court of Appeals (R. 137) is reported at 175 F. 2d 555.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1949. (R. 138.) A petition for rehearing was denied August 16, 1949. (R. 152.) The petition for a writ of certiorari was filed on Octo-

ber 29, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

### QUESTION PRESENTED

Whether the court below correctly affirmed the holding of the Tax Court, based on the entire record, that the taxpayer and his wife and two children did not truly intend to carry on business as partners in the taxable years.

### STATUTE INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME
>
> (a) *General Definition.* — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *[1]
>
> (26 U.S.C. 1946 ed., Sec. 22.)

### STATEMENT

The facts, as found by the Tax Court (R. 122-128), are not in dispute. The petitioner had, as of

[1] This was amended by Sections 1 and 3 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574, in respects not here material.

June 1942, acquired all the stock—forty shares—of Newark Screw Products, Inc. (R. 123.) Shortly after acquiring the stock, he gave his wife, Theresa, 13⅓ shares and 6½ shares each to his two children, Salvatore and Rosemarie (then aged 16 and 14, respectively), the children's shares being held in trust by Theresa. (R. 123.) In October, 1942, after conferences with an accountant and tax specialists, in which particular attention was paid to the tax advantages of a family partnership, the assets of the corporation were liquidated and a "limited partnership" agreement executed between the petitioner and Theresa, acting individually and as trustee for the children. (R. 123-125.) Each member of the family contributed the assets to which he had become entitled upon the liquidation of the corporation, and the agreement further recited that each was to devote his "time, attention, skill and best efforts to the business." (R. 124-125.) The petitioner was the only general partner; his wife and children were "limited partners." After the payment of annual salaries of $5,200 to the petitioner and $1,200 to his wife, the petitioner was to receive 40 percent of the earnings and each of the others 20 percent.

During the tax years in question, 1943 and 1944, Salvatore and Rosemarie performed miscellaneous tasks in connection with the business after school and during vacations. Theresa did various sorts of mechanical and clerical work both at home and at the office. No record was kept of the hours

worked by Theresa and her children, but during the years in question Theresa received $2,100 as compensation for services rendered, Rosemarie $1,400 and Salvatore $495. (R. 125-127.)

The petitioner retained full control of hiring, firing, production and purchasing. (R. 126.) He sometimes consulted the members of his family, particularly Theresa, as to the problems of the business. (R. 126-127.) On some occasions the whole family participated in discussions of the affairs of the business. (R. 126.)

The Commissioner, finding that the petitioner and his family did not constitute a partnership for tax purposes, and that the entire earnings of the business represented income to the petitioner, determined deficiencies in the petitioner's income tax for 1943 and 1944. (R. 8.) The Tax Court, after reviewing the facts, held that "On the entire record we cannot conclude that this family 'really and truly intended to join' together as a partnership," citing *Commissioner* v. *Tower,* 327 U. S. 280. (R. 128-130.) The Court of Appeals affirmed. (R. 137.)

ARGUMENT

The petition presents no problem warranting review by this Court. The case involves merely the application to the particular facts in this record of correct legal principles, as enunciated by this Court in *Commissioner* v. *Culbertson,* 337 U. S. 733, *Commissioner* v. *Tower,* 327 U. S. 280 and *Lusthaus* v. *Commissioner,* 327 U. S. 293. There is no conflict.

In *Commissioner* v. *Culbertson, supra,* the Court,

expounding its previous decision in *Commissioner v. Tower, supra,* made it plain that the essential test laid down by the latter decision was "whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both." 337 U. S. at p. 741, quoting 327 U. S. at p. 287. It is apparent that the Tax Court applied the correct legal principle, for its holding was explicitly based on its inability to conclude, after considering all the facts, that the family "really and truly intended to join" together as partners. (R. 130.)

The conclusion of the Tax Court is not only not "clearly erroneous" but is abundantly supported by the record. A dominant theme in the discussions preceding the formation of the "partnership" was the tax saving to be derived therefrom. The wife and children made no genuine contribution of capital to the "partnership", for they merely gave that which they had shortly before received as a gift from the taxpayer. The taxpayer's substantial control over and ownership of the business was uninterrupted. The services of the wife and children were essentially those of minor employees, and, as the Tax Court pointed out (R. 130), "the salary payments provided for the family and allowed as deductions by respondent amply disposed of the value of any services rendered." The occasional family discussions of the business did not go beyond what is normal in any family, the breadwinner of which operates a business. While none of these cir-

cumstances is in itself decisive of the issue, taken together they certainly do not present a situation in which "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." *Commissioner* v. *Culbertson,* 337 U. S. 733, 742.

Since this case turns upon its peculiar facts, there is no conflict with other cases. While *Lawton* v. *Commissioner,* 164 F. 2d 380 (C.A. 6), involved a factual situation resembling in some particulars the present one, the decision in that case rested in part on the fact that the wife and children (who were much older than the petitioner's children) had, for many years before the formation of the partnership, cooperated with the taxpayer in building up the business. 164 F. 2d at p. 384. No such circumstances are present here. Moreover, it may be doubted whether the *Lawton* case, which antedates this Court's decision in *Commissioner* v. *Culbertson, supra,* is correct in the light of the latter decision.

Nor does *Blair* v. *Commissioner,* 300 U. S. 5, present a conflict. There the donor of an equitable interest had not retained dominion and control of the property transferred; here, on the contrary, the Tax Court found on the strength of ample evidence that the taxpayer never relinquished substantial ownership and control of the property purportedly given to his wife and minor children. Cf. *Commissioner* v. *Culbertson, supra; Commissioner* v. *Sunnen,* 333 U. S. 591; *Harrison* v. *Schaffner,* 312 U. S.

579; *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Clifford,* 309 U. S. 331. Other cases referred to by the taxpayer are similarly distinguishable on their facts.

CONCLUSION

The decision below turns upon the particular facts of the case, is correct and presents no conflict. It is, therefore, respectfully submitted that the petition should be denied.

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